No. 17-532

IN THE

Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On a Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF OF *AMICI CURIAE* SOUTHERN UTE INDIAN TRIBE AND UTE MOUNTAIN UTE TRIBE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici Southern Ute Indian Tribe and Ute Mountain Ute Tribe are federally recognized Indian Tribes that ceded a large portion of their common treaty lands in Colorado to the United States ("the Brunot Cession"), under an agreement that expressly confirmed their right "to hunt upon said [ceded] lands so long as the game lasts and the Indians are at peace with white people." Eleven months following Congress' ratification of the Brunot Cession agreement, Congress passed the act enabling Colorado's admission as a State "upon an equal footing with the original States in all respects whatsoever . . . ." Subsequently, Congress withdrew and reserved for national forest purposes certain lands in Colorado, including portions of the ceded area. *Amici* have a substantial interest in confirming that neither statehood nor the creation of national forests implicitly abrogated the hunting rights expressly acknowledged by the United States in securing the cession of those Indian treaty lands.

Further, despite episodes of disagreement, *amici* and the State of Colorado have worked together to avoid disputes and to manage cooperatively the hunting of deer, elk, and other game that occupy the ceded area so that "the game lasts" for the mutual benefit of non-Indian and Ute tribal hunters. Off-reservation hunting rights can and do exist compatibly with State interests. In fact, acknowledgement of off-reservation tribal hunting rights can be an important

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made a monetary contribution to fund the preparation or submission of this brief. Prior to the filing of this brief, counsel of record for all parties provided their written blanket consent to the filing of briefs *amici curiae*.

step in cooperative State-Tribe management of game, both on and off of Indian reservations.

SUMMARY OF ARGUMENT

For the reasons set forth in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-08 (1999), statehood is not an unspoken condition that implicitly terminated tribal off-reservation hunting rights. The absence of such abrogation language in Indian treaties and cession agreements confirming hunting rights, and the canons of construction that favor Native American beneficiaries of such instruments, weigh heavily against automatic termination of off-reservation hunting rights via statehood. Certainly, the government's negotiators did not indicate that the promises on which Tribes relied for their future sustenance and survival in ceding vast areas of treaty lands would dissolve upon statehood.

In ratifying cession agreements, Congress did not add language or otherwise indicate that the very off-reservation hunting rights being approved would terminate upon passage of legislation enabling statehood. The temporal juxtaposition of congressional ratification of the Brunot Agreement and Colorado's statehood illustrates the incongruity of the statehood-abrogation equation advanced by the State of Wyoming in this case. The Court should not view Congress' silence as to the effect of statehood on tribal off-reservation hunting rights as ending those rights under the equal footing doctrine or related theories.

Nor should the Court equate the creation of national forests with terminating tribal off-reservation hunting rights. The purposes of withdrawal and reservation of national forests do not conflict with the exercise of off-reservation tribal hunting rights in national forests.

Congress has, in fact, demonstrated the compatibility of national forest existence and the more-encompassing status of "Indian country" by statutorily confirming Indian reservation boundaries that include national forest lands. In 1984, for example, Congress included portions of the San Juan National Forest in describing the boundaries of the Southern Ute Indian Reservation in southwest Colorado. *See* Act of May 21, 1984, Pub. L. No. 98-290, § 3, 98 Stat. 201, 202.

Provisions of agreements with Indian Tribes that terminate the exercise of off-reservation hunting rights upon such land becoming occupied were intended to minimize the potential for conflicts with settlers. Treating national forest establishment as occupancy—a limitation intended for conflict-avoidance purposes—grossly reduces the scope of hunting rights to be exercised under applicable Indian treaties and cession agreements in ways not contemplated by Congress or by the tribal parties.

Decades ago, *amici*, Colorado's two Ute Tribes, experienced conflict with the State of Colorado in the exercise of their hunting rights, both on and off-reservation, disputes similar in many respects to the current conflict between members of the Crow Tribe and the State of Wyoming. In resolving those disagreements, Colorado's Ute Tribes and the State of Colorado entered into separate memoranda of understanding that recognize tribal off-reservation hunting rights in the Brunot Cession area. Under those agreements, each Tribe regulates the issuance of hunting permits for elk and deer to tribal hunters in the Brunot Cession area. The frequent exchange of information between *amici* and Colorado's Parks and Wildlife Division about the harvesting of such game and the management of other species ensures that hunting will be

available for tribal and non-tribal hunters now and into the distant future. The confirmation of *amici's* off-reservation hunting rights did not adversely affect game management, and may, in fact, have fostered meaningful coordination and cooperation between the State of Colorado and the *amici* Tribes. Similarly, the recognition of the Crow Tribe's off-reservation hunting rights in Wyoming would likely lead to joint consultation and cooperative management of game.

ARGUMENT

I. CONGRESS DID NOT IMPLICITLY ABROGATE INDIAN HUNTING RIGHTS IN ENABLING WESTERN STATES TO JOIN THE UNION ON AN "EQUAL FOOTING" WITH ORIGINAL STATES.

As the majority of the Court concluded in *Mille Lacs*, "there is nothing inherent in the nature of reserved treaty rights to suggest that they may be extinguished by *implication* at statehood." *Mille Lacs*, 526 U.S. at 207 (emphasis in original) (distinguishing *Ward v. Race Horse*, 163 U.S. 504 (1896)). Rights to land and usufructuary rights to hunt, fish, or gather reserved by Tribes in treaties and cession agreements simply do not constitute a federal governmental impairment of "fundamental attributes of state sovereignty" so essential to "governmental existence" as to render those reserved tribal rights invalid under the equal footing doctrine. *Id.* at 204 (citing *Coyle v. Smith*, 221 U.S. 559, 573 (1911), and quoting *Race Horse*, 163 U.S. at 516).

Article IV of the Treaty with the Crow Indians, May 7, 1868, 15 Stat. 649, 650 (1869), provided as follows:

> The Indians herein named agree, when the agency-house and other buildings shall be

> constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but *they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.*

(emphasis added).

In the absence of other treaty language or clear evidence of the parties' mutual intent, a determination that such tribal treaty rights evaporate upon statehood would conflict directly with the fundamental underpinnings of treaty interpretation and federal Indian law. A review and analysis of the "history, purpose, and negotiations" of treaties "is central to [their] interpretation . . . ." *Mille Lacs*, 526 U.S. at 202 (citing *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999)). Assigning abrogation effect to silence "would run counter to the principles that treaties are to be interpreted liberally in favor of the Indians . . . ." *Id.* at 194 n.5 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675-76 (1979), and *Winters v. United States*, 207 U.S. 564, 576-77 (1908)). "[W]e interpret Indian treaties to give effect to the terms as Indians themselves would have understood them." *Id.* at 196 (citing *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. at 675-76, and *United States v. Winans*, 198 U.S. 371, 380-81 (1905)). And, while "Congress may abrogate Indian treaty rights . . . it must clearly express its intent to do so." *Id.* at 202 (citing *United States v. Dion*, 476 U.S. 734, 738-40 (1986)).

Those principles dictate that there must be clear evidence that the government's negotiators of treaties or cession agreements had informed Tribes that future statehood would bring an automatic end to their reserved hunting rights, and, in the absence of that clear evidence, the treaties or cession agreements should be interpreted as confirming those rights beyond statehood. Evidence of such disclosure does not exist, and the relative timing of cession agreements and statehood makes it unlikely that the potential abrogation of hunting rights through statehood was even contemplated.

Under the Ute treaty of 1868, the Utes held lands in the western third of what would later become the State of Colorado. Treaty with the Ute, March 2, 1868, 15 Stat. 619 (1869). In 1873, Felix R. Brunot, Chairman of the Board of Indian Commissioners, represented the United States in negotiating the cession of approximately 3.7 million acres of the Ute treaty lands. *See* Agreement of September 13, 1873 ("Brunot Agreement"), ratified by Act of April 29, 1874, 18 Stat. 36 (1874). The practical need for the cession arose from the unlawful influx of miners into a portion of Ute treaty lands upon discovery of hard rock minerals in the San Juan Mountains. In the spring of 1873, approximately one year after Congress had authorized cession negotiations to proceed, Act of April 23, 1872, 17 Stat. 55 (1873), and several months before the parties would reach final agreement, Mr. Brunot wrote to Secretary of the Interior Columbus Delano:

> In my opinion the most important first step towards adjustment of pending difficulties, which cannot long be safely or rightly delayed, is to eject the trespassers from the reservation, and at once to step upon the

> Government, believing, as I do, that a failure to take it will lead to a disastrous conflict with this hitherto friendly people, as unprovoked and unjust as any of those which disgraced the past history of wars with Indians.
>
> There are persons in Colorado, as elsewhere . . . [who] may suggest that the better mode of meeting the case is to concentrate large bodies of troops in the vicinity, permit and encourage encroachments upon the reservation by miners, and be prepared when the collision comes to "make short work" with the Utes. The naked proposition to me seems simply infamous, and I most sincerely hope that the Government will not suffer itself to be drawn into an unjust war by delaying to eject the miners from the reservation.[2]

Removal of miners from the rugged terrain of the San Juans having been deemed impossible, and a Presidential order for their ejectment having been suspended, the negotiators recommenced efforts to obtain the Utes' consent to a cession of a large block of mountainous territory. *See* U.S. Office of Indian Affairs, *Report of the Commission to Negotiate with the Ute Tribe of Indians* (October 15, 1873) in *Papers Accompanying 1873 Commissioner of Indian Affairs Annual Report to the Secretary of the Interior* at 83 (1874) ("Brunot Report"). Only after Mr. Brunot assured the Ute chiefs that they would be able to continue to hunt in the ceded lands, did the Utes agree

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[2] CHARLES LEWIS SLATTERY, FELIX REVILLE BRUNOT 1820-1898, A CIVILIAN IN THE WAR FOR THE UNION, PRESIDENT OF THE FIRST BOARD OF INDIAN COMMISSIONERS 205 (Longmans, Green, and Co., 1901), https://archive.org/details/felixrvellebru01slatgo og.

to set aside the Brunot Cession area from their reservation. *Id.* at 109 (Mr. Brunot to Chief Ouray: "I would say in the paper you could hunt in the part sold as long as there is any game in it."). The agreement averted a disastrous conflict.

Nothing in the language of the Brunot Agreement or in the historical report of negotiations indicates that Colorado's statehood would end the Utes' hunting rights in the San Juan Mountains. Further, in legislatively ratifying the cession agreement, Congress placed no additional limitation on the hunting rights provision allowing the Utes "to hunt upon said lands so long as the game lasts and the Indians are at peace with the white people." Act of April 29, 1874, §1, 18 Stat. 36, 37 (1874) (incorporating Brunot Agreement). The only congressional discussion of the agreement occurred on the House floor preceding passage of the legislation in that body approving the agreement (H.R. 2193, 43rd Cong., 1st Sess. (1874)). Representative Loughridge of Iowa unsuccessfully objected to the legislation on the broad ground "that it confirms *a treaty lasting forever*." 2 Cong. Rec. 2495 (1874) (emphasis added). There is nothing in the legislative history to suggest even remotely that the United States intended to break faith with the Utes by inserting an unwritten limiting condition of statehood on the hunting rights provision.

The Brunot Agreement is noteworthy in part because of the close temporal proximity of its ratification by Congress to Colorado statehood. Less than one month after the Brunot Agreement became law, on April 29, 1874, the House Committee on Territories reported out the bill, H.R. 435, 43rd Cong., 1st Sess. (1874), that became, in essentially the same form, the act enabling Colorado to enter the Union. Act of March 3, 1875, 18

Stat. 474 (1875). It is incomprehensible that Congress considered statehood as nullifying the key provision of a mutually negotiated cession agreement that had averted warfare in the San Juan Mountains only months before. Mr. Brunot certainly had no inkling that such would be the case, and it is reasonably likely that Chief Ouray and the Utes would have rejected the agreement had they thought that their rights to hunt in the San Juans would end within 18 months of their signing the Brunot Agreement. It is even less likely that the parties to the negotiation of the 1868 Treaty between the Crow Tribe and United States would have considered the future carving of states from western territories—Wyoming's statehood more than 20 years later—as terminating off-reservation hunting rights, a critical aspect of the 1868 Treaty with the Crow Indians. *See* Act of July 10, 1890, 26 Stat. 222 (1891) (admitting the State of Wyoming "into the Union on an equal footing with the original States in all respects whatsoever"). In sum, statehood did not terminate the off-reservation hunting rights of *amici* or the Crow Tribe.

II. THE EXERCISE OF TRIBAL HUNTING RIGHTS ON NATIONAL FOREST LANDS DOES NOT CONFLICT WITH THE PURPOSES OF WITHDRAWAL AND RESERVATION OF FORESTS.

In affirming the Sheridan County Circuit Court's conviction of Petitioner for violations of Wyoming hunting laws (Pet. App. 33), Wyoming's Fourth District Court relied principally on *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir., 1995), *cert. denied*, 517 U.S. 1221 (1996). Pet. App. 26. In so doing, the District Court looked to *Repsis* to conclude alternatively that Wyoming's statehood and the

establishment of the Big Horn National Forest each served independently to terminate the Crow Tribe's off-reservation hunting rights and to defeat Petitioner's legal defense. Pet. App. 33-34.

The second determination of *Repsis*, one not even addressed by the *Repsis* trial court, was that "creation of the Big Horn National Forest resulted in the 'occupation' of the land," and consequently, the termination of the Crow Tribe's off-reservation hunting rights in the Big Horn National Forest. *Repsis*, 73 F.3d at 993. The *Repsis* court devoted one paragraph (five sentences) of analysis in concluding that national forest creation constitutes occupancy, without ever examining the compatibility or incompatibility of national forest creation with Crow tribal hunting rights. *Id.* *Amici* submit that the *Repsis* court's conclusion as to the effect of national forest creation was incorrect, and that the Wyoming State District Court's acceptance of that alternative determination should be reversed.

National forest designation by itself does not constitute occupancy and is not inherently inconsistent with reserved tribal hunting rights. In passing Section 24 of the Act of Mar. 3, 1891 (commonly referred to as the Forest Reserve Act), that first authorized the President to establish forest reserves, Congress also expressly provided that "nothing in this act shall change, repeal, or modify any agreements or treaties with Indian tribes for disposal of their lands . . . and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements . . . ." Act of Mar. 3, 1891 §10, 26 Stat. 1095, 1099 (1891).

Under authority of Section 24 of the Forest Reserve Act, President Grover Cleveland initially designated

the Big Horn National Forest as a public forest reserve on February 22, 1897. Pres. Proc. No. 30, 29 Stat. 909 (1897). Far from constituting occupancy, the Presidential Proclamation warned all persons against making legal entry for settlement on the reserved lands. Those limitations on settlement of the lands ultimately designated as the Big Horn National Forest are directly at odds with the notion that the forest lands became occupied and were no longer "unoccupied" upon the national forest's creation.

A. Congress has expressly confirmed Indian country boundaries that include national forest lands.

As of September 30, 2012, national forests in the United States included almost 200 million acres of land "intermingled" with approximately 40 million acres of "other federal land, Tribal, State, local, corporate and private lands." U.S. Dep't of Agric., *Establishment and Modification of National Forest Boundaries and National Grasslands, A Chronological Record 1891-2012* at iv, FS-612 (2012). The complicated histories of Indian reservations include examples of withdrawals of tribal lands for national forest and other purposes, sometimes leaving the status of the withdrawn land uncertain for Indian country purposes.

The Southern Ute Indian Reservation exemplifies the complications arising from allotment, homesteading, national forest withdrawals, and post-Indian Reorganization Act restoration.[3] In 1907, President

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[3] *See, e.g., Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999) (determining ownership of coal bed methane extracted from coal deposits reserved by the United States in patents under 1909 and 1910 Coal Lands Acts and restored to the Tribe under the Indian Reorganization Act).

Theodore Roosevelt issued a proclamation substantially expanding the size of the San Juan Forest Reserve originally established in 1905. Pres. Proc. of March 2, 1907, 34 Stat. 3308 (1907); Pres. Proc. of June 3, 1905, 34 Stat. 3070 (1907). While the original San Juan Forest Reserve consisted of lands in the Brunot Cession area, a portion of the 1907 expansion brought in approximately four governmental townships located within the remaining un-ceded Southern Ute Indian Reservation.[4] The jurisdictional status of the on-reservation, national forest townships remained uncertain for decades. In 1984, Congress confirmed the exterior boundaries of the Southern Ute Indian Reservation as including more than 80 square miles of federally-owned land within the reservation townships that had been part of the 1907 expansion and clarified the jurisdictional status of those lands. Act of May 21, 1984, Pub. L. No. 98-290, § 3, 98 Stat. 201, 202.

For purposes of the conduct of the Southern Ute Indian Tribe, its members, and other Native Americans, that San Juan National Forest land overlapping the boundaries of the Reservation is expressly considered Indian country. Congressional recognition of a sizeable portion of national forest land as being within an Indian reservation renders unpersuasive the suggestion that tribal hunting rights cease to exist once

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[4] The entire San Juan National Forest contains approximately 1.9 million acres consisting principally of ceded lands from the Brunot Cession. *See* U.S. Forest Service, U.S. Dep't of Agric., *Record of Decision, Final Environmental Impact Statement for the San Juan National Forest Land and Resource Management Plan* at 4 (Sept. 2013), http://www.fs.fed.us/r2/sanjuan/ (providing Forest Service Plan 2013).

national forest designation is obtained. Instead, the exercise of tribal hunting rights—and the more expansive status of Indian country—is compatible with national forest status.[5]

B. Treating national forest creation as occupancy that defeats Indian hunting rights far exceeds the conflict-avoidance objectives of conditioning such rights upon non-occupation.

Conflict avoidance was a common goal during negotiations with Tribes in the late 1860s and early 1870s. Toward that end, Congress created the Indian Peace Commission in 1867 to negotiate treaties with "Indian tribes" and to "insure civilization for the Indians and peace and safety for the whites." Act of July 20, 1867 §1, 15 Stat. 17 (1869). The Indian Peace Commission represented the United States in negotiations with the Crow Tribe and the Shoshone and Bannock Tribes in 1867 and 1868. *See* U.S. Office of Indian Affairs, *Report to the President by the Indian Peace Commission* (January 7, 1868) in *Papers Accompanying Commissioner of Indian Affairs Annual Report to the Secretary of the Interior* for the *Year 1868* at 26 (1868); *Extract from Report of the Secretary of Interior* at III (1868).

Hunting by tribal members on lands occupied by settlers certainly increased the potential for conflict. Thus, the language in Article IV of the 1868 Treaty with the Crows, 15 Stat. 650, and other treaties negotiated that same year, limiting the right to hunt

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[5] Aside from the portions of the San Juan National Forest within the Southern Ute Indian Reservation, the Brunot Cession lands within which *amici* exercise off-reservation hunting rights also include portions of the Uncompahgre National Forest.

to the unoccupied lands of the United States, was likely intended to ensure that "peace subsists among the whites and Indians."

Similarly, during negotiations with the Utes in 1873, Felix R. Brunot mentioned a visit earlier in the year with another Tribe where "the white man had gone upon their lands," and Mr. Brunot could foresee that "war would be made an excuse to get the land for nothing." Brunot Report at 101. As previously discussed, *see* pp. 6-8, *supra,* rising tensions between white miners and the Utes within the borders of the Utes' 1868 reservation underlay the negotiations in 1873 between the Utes and the Board of Indian Commissioners. When the bill to ratify the Brunot Agreement, H.R. 2193, was presented in the House of Representatives on March 26, 1874, congressional speakers acknowledged the urgency of ratifying the agreement to appease the Utes and avoid an "Indian war." 2 Cong. Rec. 2494-95 (1874). In countering objections to the agreement, Representative Averill stated that the bill was "of the greatest public necessity" and that, unless the bill passed immediately, "results of a serious nature will ensue" and "war will be inevitable with those Indians." *Id.* at 2495. Compounding Representative Averill's statements, Representative McNulta added, "We want to give the Indians the rights they are entitled to under the treaty, if they do not get them soon I apprehend they will make a fight for them." *Id.*

Clearly the principal concern among governmental negotiators and Tribes during the late 1860s-1870s was maintaining peace in the face of the expanding pressures of western settlement. The preservation of forests through the establishment of forest reserves could not have been foreseen as an event that would

heighten hostilities or as meeting the "occupancy" condition on ceded lands that would end tribal hunting rights. Indeed, as Congress expressly directed in the law initiating the withdrawal of forest reserves, the preservation of forest lands was not intended to "change, repeal, or modify any agreements or treaties with Indian tribes." Act of Mar. 3, 1891 §10, 26 Stat. at 1099.

III. THE CONFIRMATION OF OFF-RESERVATION TRIBAL HUNTING RIGHTS CAN FOSTER COOPERATIVE GAME MANAGEMENT PRACTICES BETWEEN STATES AND TRIBES INVOLVING BOTH ON-RESERVATION AND OFF-RESERVATION LANDS.

Amici and the State of Colorado have previously disagreed about the existence and scope of *amici's* hunting rights and, in the 1970s, both *amici* engaged in separate litigation with the State of Colorado over their members' exercise of hunting rights, litigation resembling the current dispute between the Petitioner and the State of Wyoming. In one case, *People v. Whyte,* a member of the Ute Mountain Ute Tribe holding a tribal hunting license, killed a deer for food in the Brunot Cession area in the San Juan National Forest. He was stopped by State wildlife officials, who confiscated the deer and cited him for killing a deer without a valid Colorado hunting license. The tribal member's citation was the subject of lengthy litigation, first in the Montezuma County Court (which dismissed the charges based on the Brunot Agreement) and then in the Colorado State District Court, which reversed the lower court decision and remanded the matter for additional proceedings. *People v. Whyte,* Docket No. 7256 (Cnty Ct. for Montezuma County,

Colo., June 4, 1973) *rev'd*, Crim. Action No. 1727 (Dist. Ct. for Montezuma County, Colo., June 10, 1974).

On the heels of the *Whyte* case, the Ute Mountain Ute Tribe commenced a federal declaratory judgment action against the State of Colorado to confirm Brunot Agreement hunting rights. *Ute Mountain Tribe of Indians v. State of Colorado*, C.A. No. 78-C-O220 (D. Colo., filed March 1, 1978). The case was resolved through entry of a consent decree signed by representatives of the parties and the Department of the Interior, and approved by Senior District Court Judge Hatfield Chilson, that recognized the right of Ute Mountain Ute tribal members to hunt in the Brunot Cession Area for subsistence, religious, or ceremonial purposes without State licensing but as authorized under permits issued by the Ute Mountain Ute Tribe. *See id.*, Consent Decree (July 6, 1978). The Consent Decree also provided for coordination between tribal and Colorado officials in designating areas for hunting outside of normal state seasons and for ongoing cooperative management activities.

In another situation, a Southern Ute tribal member was cited by both the Southern Ute Indian Tribe and the State for an incident that occurred on private, non-Indian fee land within the exterior boundaries of the Southern Ute Indian Reservation. The Tribe convicted the tribal member for unlawfully killing three deer. The State of Colorado cited the tribal member for unlawfully possessing three deer and for hunting without a valid and proper Colorado hunting license. With the support of the Tribe, the tribal defendants sought to enjoin the State prosecution of the tribal member in federal district court. *Silva v. Hyde*, C.A. No. C-3858 (D. Colo., filed March 17, 1972). To resolve

the dispute, the parties entered into a stipulation, which, in addition to ending the State proceedings, addressed the hunting activities of tribal members off the Reservation and the hunting activities of both Indians and non-Indians on the Reservation. Notably, the Tribe agreed to refrain from exercising its off-reservation hunting rights outside the exterior boundaries of the Reservation with the caveat that such agreement did not waive the Tribe's right subsequently to assert its off-reservation hunting rights. *Id.*, Order (Aug. 30, 1972) (approving Stipulation and Settlement).

As time has passed, *amici* and the State of Colorado have refined their mutual understandings and signed separate agreements in 2008 and 2013 governing the exercise of *amici's* off-reservation hunting rights in the Brunot Cession area. *See* Memorandum of Understanding between the Ute Mountain Ute Tribe and the State of Colorado Concerning Wildlife Management and Enforcement in the Brunot Area (Jan. 10, 2013); Memorandum of Understanding between the Southern Ute Indian Tribe and the State of Colorado Concerning Wildlife Management and Enforcement in the Brunot Area (Sept. 15, 2008). As described in the recitals of those agreements, the parties seek to, "promote cooperation and communication in the management and use of Brunot Area wildlife resources . . . avoid confrontation related to the exercise of enforcement jurisdiction by the Tribe and State . . . provide a process to avoid and resolve conflicts . . . and facilitate exercise of the Tribe's Brunot Agreement rights in a manner that is respectful of the interests" of each Tribe and the State.

Each memorandum of understanding takes a partnership approach to managing deer, elk, and other

game in the Brunot Cession area, ensuring that "the game lasts" for the long-term benefit of *amici* and the State. Pursuant to its memorandum of understanding with the State, the Southern Ute Indian Tribe has issued extensive hunting regulations specific to the Brunot Cession area that address opening and closure dates, bag and possession limits, firearm and equipment requirements, and permitting requirements. Southern Ute tribal officials update these regulations on a yearly basis. *See* Division of Wildlife Resource Management, Southern Ute Indian Tribe, *2018-2019 Brunot Area Hunting & Fishing Proclamation for Brunot Hunting & Fishing by Southern Ute Tribal Members*, https://www.southernute-nsn.gov/natural-resources/wildlife-resource-management/hunting (providing Documents). Additionally, the Southern Ute Indian Tribe's officials meet regularly with the officials from Colorado's Parks and Wildlife Division to exchange information about the Brunot Cession area, including wildlife data, planning and management goals for upcoming hunting seasons, and permitting and harvesting quotas.

Amici's off-reservation hunting rights and the State of Colorado's acknowledgment of those rights were the impetus for the cooperative Tribe-State relationship that exists today. The arc of *amici's* relationship with the State with respect to the Brunot Cession area demonstrates that off-reservation hunting rights are not incompatible with State interests, and the agreements between the *amici* and the State of Colorado have fostered relationships that serve the conservation and management interests of both the Ute Tribes and the State.

The experiences of *amici* suggest that recognition of Crow tribal hunting rights in the Big Horn National

Forest in Wyoming would lead to cooperative engagement between the Crow Tribe and the Respondent in game management. The recognition of the Crow Tribe's hunting rights is consistent with longstanding precedent confirming the supremacy of federal law established by treaty with respect to the regulation of wildlife. *Hughes v. Oklahoma*, 441 U.S. 322, 342 (1979); *Missouri v. Holland*, 252 U.S. 416, 434 (1920). The primacy of federal law, animated by the "conservation necessity" accommodation of State interests in management of natural resources, should ensure that the Crow Tribe's "federally guaranteed" off-reservation hunting rights continue to be reasonably utilized by tribal members for the foreseeable future. *Mille Lacs*, 526 U.S. at 205.

CONCLUSION

The Court should reverse the conviction of Petitioner and the judgment of the District Court for Sheridan County, Wyoming.

Respectfully submitted,

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